(35)
10-24-00

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE,	:	
	:	
Plaintiff	:	Civil Action No. 1:00-CV-1090
	:	
v.	:	(Chief Judge Rambo)
	:	
DR. ROBERT CLARK, *et al.*,	:	(Magistrate Judge Smyser)
	:	
Defendants	:	

SUPPLEMENTAL APPENDIX TO CORRECTIONS DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO REVOKE PLAINTIFF'S *IN FORMA PAUPERIS* STATUS AND TO DEFER FILING OF RESPONSIVE PLEADING TO PLAINTIFF'S AMENDED COMPLAINT

Exhibit 1 . Order filed on July 20, 2000 in *Jae v. Dr. Laskey, M.D.*, Civil Action No. 1:CV-99-1610 (USDC, M.D. Pa.)

Respectfully submitted,

Robert M. Wolff
Assistant Counsel
Attorney Identification No. 42798
Counsel for Corrections Defendants

Pennsylvania Department of Corrections
Office of Chief Counsel
55 Utley Drive
Camp Hill, PA 17011
(717) 731-0444

Dated: October 23, 2000

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE,	:	CIVIL NO. 1:CV-99-1610
Plaintiff	:	(Judge Rambo)
v.	:	(Magistrate Judge Smyser)
DR. LASKEY, M.D., Medical Director,	:	
Defendant	:	

ORDER

The basis for this Order is stated herein, pages 1-26, and the Order is stated on page 26.

On September 3, 1999, the plaintiff filed the captioned complaint pursuant to 42 U.S.C. § 1983. On September 3, 1999, the plaintiff also filed a motion for a Temporary Restraining Order (TRO) or a Preliminary Injunction (PI) and a brief and affidavit in support of that motion. The plaintiff did not pay the filing fee and did not file an application to proceed *in forma pauperis* or the authorization form to have funds deducted from his prison trust fund account.

By an Order dated September 10, 1999, and filed on September 14, 1999, the plaintiff was ordered to pay the $150 filing fee or complete fully and return to the court the attached application to proceed *in forma pauperis* and authorization form on or before September 24, 1999. On September 23, 1999, the plaintiff filed a motion for an enlargement of time to file an application to proceed *in forma pauperis* and authorization form to have funds deducted from his prison trust fund account. By an Order dated September 28, 1999, the plaintiff was granted an extension of time until October 4, 1999. On October 4, 1999, the plaintiff filed an application to proceed *in forma pauperis* and the authorization form to have funds deducted from his prison trust fund account.

By an Order dated October 13, 1999, the plaintiff's application to proceed *in forma pauperis* was granted, the Clerk of Court was directed to serve the plaintiff's complaint, motion for a TRO or PI, brief and affidavit on the defendant and the defendant was ordered to respond to the motion for a TRO or PI within thirty days.

After requesting and receiving an extension of time, the defendant filed a brief and documents in opposition to the plaintiff's motion for a TRO or PI on November 22, 1999.

Also on November 22, 1999, the defendant filed a motion to revoke the plaintiff's *in forma pauperis* status and to defer filing of a responsive pleading. On December 7, 1999, the defendant filed a brief in support of his motion to revoke the plaintiff's *in forma pauperis* status.

On December 10, 1999, the defendant filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6).

On December 13, 1999, the plaintiff filed a motion for an extension of time to file a reply brief in support of his motion for a TRO and PI. By an Order dated December 16, 1999, the plaintiff's motion for an extension of time was granted and the plaintiff was ordered to file his reply brief on or before January 10, 2000.

On December 16, 1999, the plaintiff filed a motion for an extension of time to file a brief in opposition to the defendant's motion to revoke his *in forma pauperis* status. By an Order dated December 22, 1999, the plaintiff's motion for an extension of time was granted and the plaintiff was ordered to file his brief in opposition on or before January 12, 2000.

On December 23, 1999, the defendant filed a brief in support of his motion to dismiss.

On January 20, 2000, the plaintiff filed another motion for an enlargement of time to file a brief in opposition to the defendant's motion to revoke his *in forma pauperis* status and a motion for an enlargement of time to file a brief in opposition to the defendant's motion to dismiss the complaint. By Orders dated January 24, 2000, the plaintiff's motions for enlargements of time were granted and the plaintiff was ordered to file his briefs in opposition on or before March 1, 2000.

On March 3, 2000, the plaintiff filed another motion for an enlargement of time to file a brief in opposition to the defendant's motion to revoke his *in forma pauperis* status and another motion for an enlargement of time to file a brief in opposition to the defendant's motion to dismiss the complaint. By an Order dated March 9, 2000, the plaintiff's motions for enlargements of time were granted and the plaintiff was ordered to file his briefs in opposition on or before April 3, 2000.

On March 31, 2000, the plaintiff filed a motion for leave to file a brief in opposition to the defendant's motion to revoke his *in forma pauperis* status which exceeds fifteen pages. By an Order dated April 6, 2000, that motion was granted.

On April 10, 2000, the plaintiff filed a document entitled "Motion for Order Requiring Prison Officials to Mail Plaintiff's Responsive Affidavit and Reply Brief to this Court and Counsel or in the Alternative Motion for Enlargement of Time to File Such, Nunc Pro Tunc and Brief in Support." The

plaintiff stated that on April 3, 2000, he turned over his brief in opposition to the defendant's motion to revoke his *in forma pauperis* status and his brief in opposition to the defendant's motion to dismiss to the business manager at SCI-Camp Hill for mailing to the court and opposing counsel. The business manager returned the documents to the plaintiff with an explanation that the plaintiff can only anticipate his prison account, which apparently had a negative balance, for $10.00 per month for postage and that he had already done so for this month. The plaintiff requested that the court order the business manager at SCI-Camp Hill to mail his briefs to the court and opposing counsel or, in the alternative, to grant him an enlargement of time until May 6, 2000 to file his briefs in opposition. By an Order dated April 14, 2000, we denied the plaintiff's request for an order requiring prisons officials to send the documents. We did, however, grant the plaintiff an extension of time until May 8, 2000, to file his briefs in opposition.

The plaintiff did not file briefs in opposition to the motion to dismiss and to the motion to revoke his in forma pauperis status. Instead, on May 15, 2000, the plaintiff filed a document entitled "Motion for Order Requiring SCI-Camp Hill Prison Officials to Return All of This Plaintiff's Legal Papers to Him and Brief In Support Inter Alia Petition for Writ of Prohibition." The plaintiff states in his motion that on April 23, 2000, he tried to commit suicide by swallowing staples from his legal papers, that as a result defendant Dr. Laskey ordered that the plaintiff's legal papers be removed from his cell and checked for staples and then returned to the plaintiff, that despite orders by another doctor, the Superintendent, the Deputy Superintendent and several lieutenants that the plaintiff's legal papers be returned to him, the property officers have failed to return his documents. The plaintiff contends that he can not file his briefs in opposition to the pending motion to dismiss and motion to revoke his in forma pauperis status because those documents have not been returned to him. By an Order dated June 8, 2000,

the plaintiff's motion for an order requiring prison officials to return his legal papers was denied.

A hearing on the plaintiff's motion for a TRO or PI and on the defendant's motion to revoke the plaintiff's *in forma pauperis* status was held on June 20, 2000. On June 20, 2000, the plaintiff filed a brief in opposition to the defendant's motion to dismiss and a brief in opposition to the defendant's motion to revoke his *in forma pauperis* status.

This Order addresses the defendant's motion to revoke the plaintiff's *in forma pauperis* status.

28 U.S.C. §1915(g) (commonly referred to as the three-strikes provision) provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted,

unless the prisoner is under imminent danger of serious physical injury.

Because the plaintiff has had at least three cases or appeals dismissed as frivolous, malicious or for failure to state a claim, *see Doc. 9 at 3*, he may not proceed *in forma pauperis* in this action unless he is under imminent danger of serious physical injury. In his application to proceed *in forma pauperis*, the plaintiff alleged that he was under imminent danger of serious injury: "Because of the "fact" that I suffer extreme shooting/burning pains in my feet & it really hurts to walk & because without treatment for such, such condition could get worse, even to the point where I could not put any pressure on my feet at or walk & I could wind up in a wheelchair as a result." *Id.* at 3(b).

In *Gibbs v. Roman*, 116 F.3d 83 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit addressed the imminent danger element of the three-strikes provision. The court held and reasoned:

> We hold, therefore, that a complaint alleging imminent danger - even if brought after the prior dismissal of three frivolous complaints - must be credited as having satisfied the threshold criterion of § 1915(g) unless the "imminent danger" element is challenged. If the defendant, after service, challenges the allegations of imminent danger . . . the district court must then determine whether the plaintiff's allegation of imminent danger is credible, as of the time the alleged incident occurred, in order for the plaintiff to proceed on the merits i.f.p. Of course, if the defendant disproves the charge that the plaintiff was placed in imminent danger at the time of the incident alleged, then the threshold criterion of § 1915(g) will not have been satisfied and the plaintiff may not proceed absent the payment of the requisite filing fee. We emphasize that the proper focus when examining an inmate's complaint filed pursuant to § 1915(g) must be the imminent danger faced by the inmate at the time of the alleged incident, and not at the time the complaint was filed.
>
> In resolving a contested issue of imminent danger, the district court may rely upon evidence supplied by sworn affidavits or depositions, or, alternatively, may hold a hearing.

Id. at 86-87 (footnote omitted).[1]

---

1. Other Courts of Appeals have disagreed with the Third Circuit's holding in *Gibbs* that the inmate must have been in imminent danger of serious physical injury at the time of the incident and not at the time the complaint is filed. *See Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999)("We agree with both the Fifth and the Eighth Circuits that the clear language of § 1915(g) establishes that the

In the instant case, defendant Laskey has challenged the plaintiff's claim of imminent danger.

At the hearing on June 20, 2000, the plaintiff testified that in April of 1999, he was seen by a podiatrist for an ingrown toenail on his left toe. At that time, he told the podiatrist about shooting/burning pains he was having in his arches and particularly the arch of his left foot. Based on statements made to him by the podiatrist, the plaintiff believes that he has diabetic neuropathy. The plaintiff further testified that on June 2, 1999, he told Dr. Arrow that the podiatrist had said that the plaintiff needs tests but that he believes the plaintiff has diabetic neuropathy. The plaintiff requested another visit to the podiatrist. Dr. Arrow told the plaintiff that he would have to speak to the defendant

---

Third Circuit's approach in incorrect."); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998)("As the statute's use of the present tense verbs "bring" and "is" demonstrates, an otherwise ineligible prisoner is only eligible to proceed IFP if he is in imminent danger at the time of filing."); *Banos v. O'Guin*, 144 F.3d 883, 885 (5th Cir. 1998)("[T]he language of § 1915(g), by using the present tense, clearly refers to the time when the action or appeal is filed or the motion for IFP status is made.").

and he went to the defendant's office. When Dr. Arrow returned from the defendant's office, he told the plaintiff that the defendant had stated that the plaintiff would not be allowed to return to the podiatrist. The plaintiff testified that the defendant did not examine the plaintiff and that he is not receiving any treatment at all for the shooting/burning pains in his feet. The plaintiff further testified that he had such pains at the time he filed the complaint and that he has had such pains on two occasions since then - once at the beginning of this year and once approximately six weeks ago.

Defendant Laskey testified at the hearing that on April 20, 1999 he examined the plaintiff and he authorized the plaintiff to be seen by a podiatrist for treatment of his ingrown left toenail. After the plaintiff's visit with the podiatrist, the plaintiff's problem with his ingrown nail was resolved. The defendant testified that as of the time the plaintiff filed the complaint in this case, he was not in imminent danger of serious physical injury with respect to any condition of his foot and that as of several weeks before the

hearing the plaintiff was not in imminent danger of serious physical injury with respect to any condition of his foot.

Based on the testimony presented at the hearing, we find that the plaintiff's allegation that he was in imminent danger of serious physical injury at the time of the incident in his complaint is not credible. Thus, the plaintiff's is not entitled to proceed *in forma pauperis* in this case.

The plaintiff argues that 28 U.S.C. § 1915(g) is unconstitutional because it burdens his fundamental right of access to the courts, it burdens his right to *in forma pauperis* status, it violates due process, equal protection and separation of powers principles, it violates 42 U.S.C. § 1983, it is unjust and unreasonable and it should not be applied retroactively.

The defendant contends that pursuant to the doctrine of collateral estoppel the plaintiff is precluded from relitigating the issues of the retroactive application of the

three strikes provision, that 28 U.S.C. § 1915(g) is unconstitutional because it deprives the plaintiff of access to the courts, due process and equal protection of the law, and because it violates separation of powers principles and the ex post facto clause because those issues were decided adversely to the plaintiff in prior cases decided by this court.

Collateral estoppel prohibits the relitigation of issues that have been adjudicated in a prior case. *In Re Docteroff*, 133 F.3d 210, 214 (3d Cir. 1997). For a party to be estopped from relitigating an issue the following elements must be present: 1)the issue sought to be precluded must be the same as the one involved in the prior action; 2) the issue must have been actually litigated; 3) the issue must have been determined by a valid and final judgment; and 4) the determination must have been essential to the prior judgment. *Id.*

In Jae v. Yung; 1:CV-98-0108, we stated and held:

> The plaintiff argues that 28 U.S.C. §1915(g) is unconstitutional because it deprives him of access to the courts, due process, and equal protection of the laws. The plaintiff also argues that 28 U.S.C. §1915(g) violates the separation of powers doctrine and the ex post facto clause. Finally, the plaintiff argues that §1915(g) should not be applied retroactively and that actions which were dismissed prior to the enactment of 1915(g) should not count as strikes.
>
> We will first address the plaintiff's retroactivity argument. The plaintiff argues that actions and appeals that were dismissed as frivolous prior to the date 28 U.S.C. §1915(g) was enacted can not be counted as strikes under the three-strikes provision. The United States Court of Appeals for the Third Circuit has already decided this exact issue. In Keener v. Pennsylvania Bd. of Probation & Parole, 128 F.3d 143, 144-45 (3d Cir. 1997), the court held that "dismissals for frivolousness prior to the passage of the PLRA are included among the three that establish the threshold for requiring a prisoner to pay the full docket fees unless the prisoner can show s/he is 'under imminent danger of serious physical injury.'" Based on Keener, the plaintiff's retroactivity argument is without merit and the twelve actions and appeals that were dismissed as frivolous count as strikes under the three-strikes provision.

Next we address the plaintiff's argument that 28 U.S.C. §1915(g) violates his right of access to the courts.

Prisoners have a constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977). The Court has described this right as fundamental. Id. at 828.

28 U.S.C. § [1915(g)] does not prevent a prisoner with three strikes from bringing constitutional claims. Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997). The statute does not extinguish any cause of action and does not bar anyone from filing suit. Rather, it merely requires that indigent prisoners who have three strikes pay the same filing fees as are imposed on non-indigent litigants. Id.

In a criminal appeal, a waiver of fees may be constitutionally required for an indigent. See e.g. Griffin v. Illinois, 351 U.S. 12 (1956). But *in forma pauperis* status for a civil litigant is not a right. Riveria v. Allin, 144 F.3d 719, 724 (11th Cir. 1998). The Court has also recognized a narrow category of civil cases in which access to the judicial process without regard to the party's ability to pay is required. M.L.B. v. S.L.J., 117 S.Ct. 555, 562 (1996) (termination of parental rights); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce). However, a waiver of filing fees is not generally required. M.L.B., supra 117 S.Ct. at 563 (citing United States v. Kras, 409 U.S. 434 (1973), for the proposition that a constitutional requirement to waive court fees is the exception not the general rule). The civil cases in which a waiver of fees has been constitutionally required deal with state

controls on family relationships. M.L.B., supra, 117 S.Ct. 563-64 ("the Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships.") The instant case does not fall within one of those narrow categories of civil cases dealing with intrusions or controls on family relationships in which the waiver of fees is constitutionally required for indigents.

Moreover, the Griffin line of cases, including M.L.B. and Boddie, do not deal with a right of access to the courts *per se* but rather with a right not be denied access on the basis of poverty. See Lewis v. Casey, 518 U.S. 343, 371 (1993)(Thomas, J., concurring)("Like Griffin, Douglas [v. California, 372 U.S. 353 (1963)] turned not on a right of access *per se*, but rather on the right not to be denied, on the basis of poverty, access afforded to others."). In the instant case, the statute does not deny any prisoner access to the federal courts on the basis of poverty. In fact, 28 U.S.C. §1915(b)(4)[2] ensures that prisoners, other than those with three strikes, will have access despite their indigency. The three strikes provision only bars a prisoner who has three strikes from proceeding *in forma pauperis*. "A legislative body may rationally and appropriately presume that three such dismissals are indicative of a propensity to abuse the court system." Wilson v.

2. 28 U.S.C. §1915(b)(4) provides: "In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."

Yaklich, 148 F.3d 596, 605 (6th Cir. 1998). Thus, the three-strikes provision does not bar access on the basis of poverty but only denies a prisoner who has already had three strikes, which could reasonably be considered to show that the prisoner has abused the system in the past, from proceeding *in forma pauperis*.

Because the three-strikes provision does not bar any prisoner from filing a suit in federal court we conclude that it does not deny the plaintiff access to the courts. See Riveria, supra, 144 F.3d at 724 (holding that 28 U.S.C. §1915(g) does not violate right of access to the courts and that "frequent filer prisoners' access to the courts remains 'adequate, effective, and meaningful' even though section 1915(g) serves to disqualify them from prepaying partial, as opposed to entire, federal court filing fees during their term of incarceration."); Wilson, supra, 148 F.3d at 605 (holding that three-strikes provision does not deny right of access to the courts); Carson, supra, 112 F.3d at 821 (same).

Furthermore, we note that the plaintiff has an adequate means of redressing the alleged violations of his constitutional rights. He may bring an action like the instant action in state court. State courts have the inherent authority to and are presumptively competent to adjudicate claims arising under the laws of the United States. Tafflin v. Levitt, 493 U.S. 455, 458 (1990). In fact, states are compelled by the Supremacy Clause to enforce federal law. See Howlett v. Rose, 496 U.S. 356, 367 (1990)(holding that states are mandated to

hear 42 U.S.C. §1983 actions and explaining that federal law is enforceable in state courts because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the state legislature). Thus, the plaintiff may bring his action in state court.[3] See Murtagh v. County of Berks, 634 A.2d 179, 183 (Pa. 1993)(42 U.S.C. §1983 action; citing Howlett); Oatess v. Norris, 637 A.2d 627 (Pa. Superior Ct. 1994)(prisoner §1983 action). "As long as a judicial forum is available to a litigant, it cannot be said that the right of access to the courts has been denied." Wilson, supra, 148 F.3d at 605.

The plaintiff also contends that 28 U.S.C. §1915(g) violates the rights to equal protection and due process.

If a law neither burdens a fundamental right nor targets a suspect class, the legislative classification will be upheld so long as it bears a rational relation to some legitimate end. Romer v. Evans, 517 U.S. 620, 631 (1996). However, if a law "is drawn on suspect lines or does

---

3. See Pa.R.Civ.P. 240 (governing *in forma pauperis* status). Recently Pennsylvania enacted a statute that imposes screening criteria to determine whether prisoner complaints are meritorious. 42 Pa.C.S. §6602(e)(2) provides that the court shall dismiss prison conditions litigation if the litigation is frivolous, malicious, fails to state a claim, or if the defendant is entitled to assert a valid affirmative defense, including immunity, which would preclude relief. 42 U.S.C. §6602(f) provides that the court may dismiss an action filed by a prisoner who has had three or more prison conditions cases dismissed pursuant to subsection (e)(2). This statute became effective on August 18, 1998. As the United States points out, given the effective date of the statute it is unlikely that the plaintiff could already have had three or more actions dismissed pursuant to 42 U.S.C. §6602(e)(2).

sufficiently burden a fundamental right, it is subject to strict scrutiny and will pass constitutional muster only if it is narrowly tailored to serve a compelling state interest." Maldonado v. Houstoun, No. 97-1893, 1998 WL 569359, at *4 (3d Cir. Sept. 9, 1998).

Neither prisoners nor indigents constitute a suspect class. Carson, supra, 112 F.3d at 821-22. As discussed previously, 28 U.S.C. §1915(g) does not sufficiently burden the plaintiff's fundamental right of access to the courts to require strict scrutiny analysis. Thus, we review §1915(g) to determine whether it is rationally related to legitimate governmental interests.[4]

"[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Under rational basis review, the classification in a statute bears a strong presumption of validity and the law must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the

4. The plaintiff cites Lyon v. Krol, 940 F.Supp. 1433 (S.D. Iowa 1996), to support his argument that 28 U.S.C. §1915(g) violates equal protection. In Lyon, the district court applied the strict scrutiny standard of review and determined that §1915(g) violates equal protection. Lyon is not binding on this court, and as discussed above we conclude that the proper standard of review is rational basis. Moreover, the Eighth Circuit found that the prisoner in Lyon had sufficient funds to pay the filing fee and that therefore he did not have standing to challenge the constitutionality of §1915(g). Lyon v. Krol, 127 F.3d 763 (8th Cir. 1997). The Eighth Circuit remanded the case to the district court for the district court to set a time by which the prisoner must pay the filing fee or have his claim dismissed. Id. at 766.

classification." Id. 313-14. The party attacking the rationality of the legislative classification has the burden "to negative every conceivable basis which might support it." Id. at 315. A legislature is not required to articulate its reasons for enacting a statute and a legislative choice "may be based on rational speculation unsupported by evidence or empirical data." Id.

"Congress enacted PLRA with the principal purpose of deterring frivolous prisoner litigation by instituting economic costs for prisoners wishing to file civil claims." Hernandez v. Kalinowski, 146 F.3d 196, 200 (3d Cir. 1998)(quoting Lyon v. Krol, 127 F.3d 763, 764 (8th Cir. 1997)).

Deterring frivolous prisoner filings is a legitimate governmental interest. Carson, supra, 112 F.3d at 822 ("It can hardly be doubted that deterring frivolous and malicious lawsuits, and thereby preserving scarce judicial resources, is a legitimate state interest."); Roller v. Gunn, 107 F.3d 227, 233 (4th Cir. 1997)("[T]he goal of the Act - curbing frivolous IFP litigation - is clearly proper."); Rivera, supra, 144 F.3d at 727 ("Unquestionably, the ends that Congress enacted section 1915(g) to achieve - the curtailment of "abusive prisoner tort, civil rights and conditions litigation' - are legitimate."); Wilson, supra 148 F.3d at 604 ("This court has held that '[d]etering frivolous prisoner filings in federal courts falls within the realm of Congress's legitimate interests....'" (quoting Hampton v. Hobbs, 106 F.3d 1281, 1287 (6th Cir. 1997)). "[P]rohibiting litigants with a history of frivolous or

malicious lawsuits from proceeding IFP will deter such abuses." Carson, supra, 112 F.3d at 822; Rivera, supra, 144 F.3d at 728 ("Plainly, Congress had a rational basis to believe that revoking altogether IFP privileges from prisoners with a demonstrated history of abuse - that is, three of more dismissals on specified grounds - would further the goal of curtailing abusive prison litigation.")

The fact that 1915(g) does not address the problem of frivolous litigation by non-indigents or by non-prisoner indigents does not render the statute irrational. "[T]he legislature must be allowed leeway to approach a perceived problem incrementally." FCC v. Beach Communications, Inc., supra, 508 U.S. at 316. Congress may address "itself to the phase of the problem which seems most acute to the legislative mind" and neglect other phases of the same problem. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

Furthermore, the differentiation in 1915(g) between prisoners with three strikes and non-prisoners with three strikes has a rational basis. Wilson, supra, 148 F.3d at 604. Prisoners and non-prisoners are not similarly situated: [Prisoners] have their basic material needs provided at state expense. They are further provided with free paper, postage, and legal assistance. They often have free time on their hands that other litigants do not possess. *See Lumbert*, 827 F.2d at 259. As a result, the federal courts have observed that prisoner litigation has assumed something of the nature of a "recreational activity." *See, e.g., Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir.

1998). Whether recreational or not, there has been a far greater opportunity for abuse of the federal judicial system in the prison setting. *See* 141 Cong.Rec. S7256 (May 25, 1995(statement of Sen. Kyl (noting that over one-fourth of civil cases filed in federal courts were filed by prisoners, and that the vast majority of these cases ended in no relief for the prisoner). Roller, supra, 107 F.3d at 234. See also Cruz v. Beto, 405 U.S. 319, 326-27 (1972) (per curiam) (Rehnquist, J., dissenting) ("[Inmates are] in a different litigating posture than persons who are unconfined. The inmate stands to gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse."); Carson, supra, 112 F.3d at 822 (distinction between prisoners and other litigants is rational); Rivera, supra, 144 F.3d at 728 ("It is equally rational for Congress to separate frequent filer prisoner indigents from prisoner indigents who file less frequently and disqualify the former class from the luxury of having to advance only a partial amount (or, if the prisoner is destitute, no amount) of the filing fee.").

We conclude that 28 U.S.C. §1915(g) is rationally related to a legitimate end. Thus, it does not violate equal protection or due process.

The plaintiff also contends that §1915(g) violates the separation of powers doctrine and the *ex post facto* clause. These arguments are meritless. 28 U.S.C. §1915(g) does not violate the separation of

> powers doctrine because it is purely procedural, it does not create or take away any cause of action from frequent filer prisoners, and as long as "frequent filer prisoners prepay the entire filing fee, courts will review their cases in the same manner as any other." Rivera, supra, 144 F.3d at 725 (rejecting separation of powers challenge to §1915(g)). 28 U.S.C. §1915(g) does not violate the *ex post facto* clause because it only applies to the filing of civil actions, it is procedural in nature and was not enacted to affect the ~~punishments already meted out for crimes.~~ Wilson, supra, 148 F.3d at 606 (rejecting *ex post facto* challenge to §1915(g).
>
> Based on the foregoing, we conclude that 28 U.S.C. §1915(g) is not unconstitutional. Pursuant to §1915(g) the plaintiff may not proceed *in forma pauperis* in this court.

1:98-98-0108, Order of Sept. 22, 1998.

Collateral estoppel bars the plaintiff from relitigating the issues of the retroactive application of the three strikes provision, that 28 U.S.C. § 1915(g) is unconstitutional because it deprives the plaintiff of access to the courts, due process and equal protection of the law, and because it violates separation of powers principles.

In addition to those issues, the plaintiff argues that 28 U.S.C. § 1915(g) is unconstitutional because it burdens his fundamental right to *in forma pauperis* status, because it violates 42 U.S.C. § 1983 and because it is unjust and unreasonable. These arguments are without merit. First, "IFP status is not a constitutional right." *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999). Second, 42 U.S.C. § 1983 is not itself a source of substantive rights. *Baker v. McCollan*, 443 U.S. 137, 143 n.3 (1979). Rather, it is merely a method for vindicating federal rights elsewhere conferred by the Constitution and federal laws. *Id.* Finally, the plaintiff's argument that 28 U.S.C. § 1915(g) is unconstitutional because it is unjust and unreasonable is simply anther way to argue that it violates due process and equal protection principles.

Based on the foregoing, we conclude that 28 U.S.C. §1915(g) is not unconstitutional. Pursuant to §1915(g) the plaintiff may not proceed *in forma pauperis* in this court. We will revoke the plaintiff's *in forma pauperis* status and order that he pay the filing fee to proceed with this case. If the

plaintiff pays the filing fee, we will then address the other motions pending in this case. If the plaintiff does not pay the filing fee, then we will recommend that the case be dismissed.

AND NOW, this 19th day of July, 2000, **IT IS HEREBY ORDERED** that the defendant's motion (doc. 19) to revoke the plaintiff's *in forma pauperis* status is **GRANTED.** The Order of October 13, 1999, granting the plaintiff's request to proceed *in forma pauperis* is **VACATED. IT IS FURTHER ORDERED** that on or before July 31, 2000, the plaintiff shall pay the entire $150.00 filing fee. If the plaintiff fails to pay the filing fee, it will be recommended that this action be dismissed.

J. Andrew Smyser
Magistrate Judge

DATED: July 19, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE,	:	
	:	
Plaintiff	:	Civil Action No. 1:00-CV-1090
	:	
v.	:	(Chief Judge Rambo)
	:	
DR. ROBERT CLARK, *et al.*,	:	(Magistrate Judge Smyser)
	:	
Defendants	:	

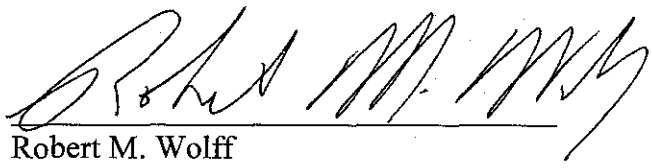
CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing SUPPLEMENTAL APPENDIX TO CORRECTIONS DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO REVOKE PLAINTIFF'S *IN FORMA PAUPERIS* STATUS AND TO DEFER FILING OF RESPONSIVE PLEADING TO PLAINTIFF'S AMENDED COMPLAINT,upon the person(s) in the manner indicated below.

Service by first-class mail
addressed as follows:

John Richard Jae, BQ-3219
SCI – Camp Hill
P.O. Box 200
Camp Hill, PA 17001-0200

James D. Young, Esquire
Lavery, Faherty, Young & Patterson
P.O. Box 1245
Harrisburg, PA 17108-1245
Counsel for Dr. Clark



Robert M. Wolff
Assistant Counsel
Attorney I.D. No. 42798

Pennsylvania Department of Corrections
55 Utley Drive
Camp Hill, Pa 17011
(717) 731-0444

Dated: October 23, 2000